No. 88-454
No. 87-1729

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

UNITED STATES OF AMERICA, Petitioner,

v.

PETER MONSANTO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPLIN & DRYSDALE, CHARTERED, Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE UNITED STATES OF AMERICA

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QUESTION PRESENTED

Does the Due Process Clause of the Fifth Amendment or the right to counsel guaranteed by the Sixth Amendment to the United States Constitution require that property restrained and alleged to be subject to forfeiture be made available to a criminal defendant to employ counsel of choice?

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INTEREST OF AMICUS CURIAE

With the Comprehensive Crime Control Act of 1984 (Pub.L.No.98-473, 98 Stat. 2040 (1984)), Congress acknowledged state and local law enforcement as full-fledged and vital partners in the national struggle against the scourge of narcotics trafficking. In that act Congress authorized the Attorney General and Commissioner of Customs to transfer to a state or local law enforcement agency forfeited property or the proceeds of a successful forfeiture proceeding in an amount proportionate to the agency's effort leading to the seizure of the asset. (Ch. III, Comprehensive Crime Control Act of 1984, amending 21 U.S.C. § 881(e) and 19 U.S.C. § 1616.) Congress renewed this warrant in 1986 (Tit. I, subtit. D, § 1992 Anti-Drug Abuse Act of 1986, amending 21 U.S.C. § 881(e) and 19 U.S.C. § 1616a), and most recently reaffirmed the importance of these "equitable transfers" in the

Anti-Drug Abuse Act of 1988 (Tit. VI, subtit. B, § 6077, amending 21 U.S.C. § 881(e)).

A state or local agency becomes eligible for an "equitable transfer" of federally forfeited property or proceeds when, acting alone, it makes a seizure which is "adopted" by a federal law enforcement agency (see, United States v. One Ford Coupe Automobile, 272 U.S. 321, 325 (1926)) and subjected to federal forfeiture proceedings (see generally, 19 U.S.C. § 1604 et seq.). Alternatively, a state or local agency may "share" the proceeds of a forfeiture action so as to reflect its contribution when it is involved cooperatively in an investigation with a federal law enforcement agency leading to the seizure and forfeiture of property under federal law. (See, the Attorney General's Guidelines on Seized and Forfeited Property, Federal Register,

Vol. 52, No. 237, Thursday, December 10, 1987, pp. 46855-46862.)

Over the past four years, state and local law enforcement agencies nationally have seized or participated in the seizure of hundreds of millions of dollars of narcotics related assets which have been subjected to federal "administrative" (19 U.S.C. § 1607) and judicial (19 U.S.C. § 1610) forfeiture proceedings (see, United States v. U.S. Currency in Amount of $2,857.00, 754 F.2d 208 (7th Cir. 1985). This month the Los Angeles Police Department reached the one hundred million dollar ($100,000,000.00) mark in drug-related seizures measured from 1985. In this period of time property and proceeds worth some two hundred million dollars ($200,000,000.00) have been transferred (back) to state and local law enforcement agencies as equitable shares of completed

forfeiture actions -- twenty-four million dollars ($24,000,000.00) in FY 1986, sixty-seven million dollars ($67,000,000.00) in FY 1987, and one hundred four million ($104,000,000.00) in FY 1988. (Statistics provided by the Drug Enforcement Administration and Federal Bureau of Investigation and do not include equitable transfers from Treasury Department agencies, in particular, the United States Customs Service.)

These seizures, successful forfeiture actions and "equitable transfers" have a double-barreled impact. First, seizure and forfeiture of narcotics related assets strip drug traffickers of their economic base. (In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637, 648 (4th Cir. 1988) (en banc), cert. granted, [hereafter cited as Caplin & Drysdale, Chartered]). Second, every dollar equitably transferred to a

state or local agency is, in keeping with the Attorney General's Guidelines, allocated exclusively for law enforcement purposes so as to increase the law enforcement resources of the agency. Thus, drug related property, either in kind or in specie, is taken from and turned against drug dealers.

California law enforcement agencies have aggressively pursued the seizure and forfeiture of narcotics related assets both in cooperation with federal agencies and in their own investigations. Nearly forty percent (40%) of equitable transfer claims received by federal agencies nationally have been submitted by California law enforcement. To date California agencies have received approximately sixty million dollars ($60,000,000.00) in equitable transfers and millions more are in process pending forfeiture.

Indeed, the utilization of these procedures has been so vigorous that the federal law enforcement agencies and United States Attorneys in California have been hard pressed to keep pace with the seizures made by state and local agencies. This has resulted in the imposition of minimum value limits by the federal offices as a condition to the acceptance of state and local initiated seizures. Moreover, the Anti-Drug Abuse Act of 1988 amends 21 U.S.C. section 881(e) in a manner which seems to reflect Congress's determination that the states should enact and employ their own forfeiture laws. (An "equitable transfer" will be barred when it would "circumvent any requirement of State law that prohibits forfeiture or limits use or disposition of property forfeited". [Tit. VI, subtit. B, § 6077].)

Recognizing the need for an effective state forfeiture mechanism, the

California Legislature modernized the State's narcotics related forfeiture statutes in 1982 and made major revisions in 1986 and again in 1988 in an effort to make these provisions as useful and effective as federal forfeiture law. (Cal. Health & Saf. Code § 11470 et seq.; Stats. 1982, ch. 1289; Stats. 1986, chs. 1032, 1044; Stats. 1988, ch. 1492.) As a result, California now has a civil, in rem narcotics related forfeiture law comparable in most particulars to section 881 of Title 21. These statutes return ninety percent (90%) of forfeited property directly to the seizing agency and prosecutors. (Cal. Health & Saf. Code § 11489.) (Nearly every state has some form of narcotics related forfeiture statute. Thirty states have enacted a version of section 505 of the 1970 Uniform Controlled Substances Act (9 Uniform Laws Annotated 187, 611-614), a civil, in rem forfeiture statute modeled on

section 881.) (Id. at pp. 187-194, id. at p. 78 (Cum.Sup. 1983).)

The ever increasing resort to asset seizure and forfeiture by law enforcement in California, the consequent burden on federal agencies, and the improvements in the State's statutes have prompted greater reliance on state forfeiture proceedings. This is a trend we expect will continue here and spread to other states.

California, therefore, has a compelling interest in the effective implementation of both federal and its own forfeiture procedures. We believe the fate of both are at stake in these cases. If a defendant has a right to use property subject to forfeiture to pay counsel, the state will be deprived of much of the property seized by its law enforcement agencies which is used to further enhance anti-drug trafficking efforts. At the same

time, the narcotics offender will be able to command high priced legal talent from his criminally acquired or tainted property.

The forfeiture allegations in the indictment underlying the Caplin & Drysdale, Chartered matter, directed against nearly all property interests of the defendant, represent the ultimate reach of existing forfeiture laws. However, that case is not particularly representative. In the vast majority of situations property seized or restrained and otherwise alleged to be subject to forfeiture is composed of discreet, readily identifiable assets which generally have an immediate and obvious connection to illegal activity as proceeds of or property used to facilitate violations of the narcotics laws. The property at stake in Monsanto is closer to the norm. (United States v. Monsanto, 852 F.2d 1400, 1401 (2d Cir.

1988), (en banc), cert. granted.)
Moreover, with rare exceptions, seizures under California's in rem forfeiture provisions involve assets worth less than one hundred thousand dollars ($100,000.00).

Invariably, it is these seized assets which are looked upon by the criminal defendant as the preferred and primary source of paying counsel. The reasons are rather obvious.

First, the desire for private counsel and the expense attended thereto can be satisfied with property which would otherwise, in all likelihood, be lost to the government. Second, whether or not the defendant has other assets, property which has been identified by the government, seized or otherwise restrained, and alleged to be subject to forfeiture is in most instances the most readily available asset with which to compensate counsel. Finally, given the nature of the narcotics

trade, whether the individual is a narcotics kingpin like Christopher Reckmeyer or a mere courier or "mule", the assets which are subject to forfeiture are normally the only property "available" to the defendant. (See, e.g., United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir. 1985).) In fact, in countless instances property seized and alleged to be subject to forfeiture may not belong to the defendant at all; it is the property of the narcotics enterprise. (See, e.g., United States v. Moya-Gomez, 860 F.2d 706, 714-715 (7th Cir. 1988).) Nevertheless, that defendant's superior in the narcotics trafficking organization, the nominal "owner" of the property, would much prefer to see the asset used to pay counsel to defend his subordinate and ensure that person's loyalty and silence than to see it forfeited to the government.

Nearly without fail, it is claimed that the very property seized and subjected to forfeiture proceedings is that "needed to pay counsel." We encountered a systematic practice in California in which seized assets were routinely assigned to counsel to pay legal fees. (See, Franchise Tax Board v. Superior Court (McKean) 168 Cal.App.3d 970, 975, 215 Cal. Rptr. 36, 38 (1985) [such an assignment is "presumptively fraudulent"]; see also, United States v. Thirteen Thousand Dollars in U.S. Currency, 733 F.2d 581 (8th Cir. 1984); United States v. $364,960.00 in U.S. Currency, 661 F.2d 319 (5th Cir. 1981); United States v. $22,640 in U.S. Currency, 615 F.2d 356 (5th Cir. 1980); United States v. Currency Totaling $48,318.08, 609 F.2d 210 (5th Cir. 1980) United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975).) The defense attorney would then seek to enforce this assignment in the criminal

proceeding by obtaining an order to return the property premised upon the defendant's asserted Sixth Amendment right to counsel of choice. When enforced these assignments all but eliminated the "res" in the forfeiture action. However, this practice was largely checked when the California Court of Appeal decided the case of People v. Superior Court (Clements), 200 Cal.App.3d 491, 246 Cal.Rptr. 122 (1988), hearing denied, Cal. Supreme Court, July 28, 1988, No. S005855.

(Clements) arose as a consolidated writ proceeding from four separate criminal prosecutions in which the judge who was presiding over the preliminary hearing of the defendant ordered the police to return seized funds ranging in an amount from approximately eighty thousand dollars ($80,000.00) to fifteen hundred dollars ($1,500.00)to the defendant to pay counsel. (In two of the

underlying proceedings, the court took no evidence on the issue of the reasonableness of the purported assignment of the seized assets to pay attorney's fees, the lack of other resources available to the defendant to employ counsel or the availability of other counsel. These two cases involved seized assets assigned in whole to defense counsel in amounts of forty-eight thousand nine hundred seventy-six dollars ($48,976.00) and seven thousand nine hundred dollars ($7,900.00), respectively. In the other two cases the court conducted an in camera hearing from which the prosecutor was excluded wherein the court purportedly entertained representations concerning the reasonableness of the assignment to pay counsel fees. The assignments in these two cases were for approximately one thousand dollars ($1,000.00) and eighty thousand dollars ($80,000.00), respectively.)

Relying principally upon the decision of the Fourth Circuit in Caplin & Drysdale, Chartered, the California Court of Appeal held that there was nothing in the California narcotics asset forfeiture provisions (Cal. Health & Saf. Code § 11470 et seq.), patterned as they are after the federal statutes, which exempted from forfeiture property necessary for bona fide attorney's fees. (People v. Superior Court (Clements), supra, 200 Cal.App.3d at pp. 497-498, 246 Cal.Rptr. at pp. 125-126.) The Court further held that the government's interest in the forfeiture of narcotics related property outweighed any Sixth Amendment right to use this property to secure counsel. (Id., 200 Cal.App.3d at pp. 498-501, 246 Cal.Rptr. at pp. 126-128.) Although not an issue in the (Clements) decision, the Court acknowledged the importance of the availability of a probable cause hearing when a claim is made

that seized or restrained assets are needed to pay counsel. (Id. 200 Cal.App.3d at p. 495, 246 Cal.Rptr. at p. 124) California law specifically provides for such a hearing. (See, Cal. Health & Saf. Code § 11488.4(g), formerly § 11488.4(h).)

Amicus curiae believes the (Clements) case was correctly decided as was Caplin & Drysdale, Chartered upon which it was based. We urge this Court to ratify these decisions as we anticipate that any ruling in these cases premised on constitutional grounds will necessarily affect proceedings under California law, as well as the federal forfeiture statutes.

Although some courts have suggested that for purposes of the Sixth Amendment attorney fee claim, there is a distinction between an in rem forfeiture action and in personam, criminal forfeiture (see, United States v. Bailey, 666 F.Supp. 1275 (E.D.Ark. 1987)), amicus curiae does

not believe that such a facile distinction would survive careful scrutiny. (See, United States v. U.S. Coin and Currency, 401 U.S. 715, 718 (1971).) Indeed, a number of courts have squarely addressed the Sixth Amendment right to counsel of choice claim in the context of an in rem forfeiture action. (See, United States v. Unit Number 7 and Unit Number 8, 853 F.2d 1445 (8th Cir. 1988); United States v. $70,476 Dollars in U.S. Currency, 677 F.Supp. 639 (N.D.Cal. 1987), appeal dismissed, 845 F.2d 329 (9th Cir. 1988); United States v. One Parcel of Land, 614 F.Supp. 183 (N.D.Ill. 1985).)

Likewise, there appears to be no reasoned basis for distinguishing between a case in which the government alleges that all or nearly all of a defendant's estate is subject to forfeiture (Caplin & Drysdale, Chartered) and that in which only particular items of property are cited

(Monsanto). If the defendant claims the asset is needed to pay counsel, and the Sixth Amendment requires that this claim be addressed, at minimum the court, prosecutor and defense will be drawn into a murky, subordinate controversy over whether the fee is reasonable (a highly subjective determination) and whether the defendant has other legitimate assets to pay counsel (a question particularly within the defendant's knowledge and concerning which the defendant can hardly be expected to be forthcoming). (See, United States v. Jones, 837 F.2d 1332, 1335 (5th Cir. 1988), petition for rehearing en banc granted; United States v. $70,746 Dollars in U.S. Currency, supra, 677 F.Supp. at 646; United States v. Nichols, 654 F.Supp. 1541, 1559 (D.Utah 1987) reversed, 841 F.2d 1485 (10th Cir. 1988); United States v. Estevez, 645 F.Supp. 869, 872 (E.D.Wis. 1986).)

Therefore, amicus curiae believes that if this Court should hold that the legitimate institution of forfeiture proceedings, in rem or in personam, implicates the Sixth Amendment, then the effective application of federal and California's asset forfeiture provisions will be seriously jeopardized and our efforts against narcotics trafficking severely undermined.

SUMMARY OF ARGUMENT

The right to counsel of choice is qualified in the first instance by the availability of legitimate means to secure counsel. The seizure or restraint of property subject to forfeiture serves a vital public interest which justifies preventing use of the property for any purpose. The restraint of property subject to forfeiture has only an incidental, non-arbitrary impact on the right to counsel of choice, indistinguishable from a host of

other circumstances. Accordingly, there is no need to weigh or balance the interests at stake. Seizure and forfeiture of criminally tainted property does not implicate the right to counsel of choice because property subject to forfeiture does not constitute the legitimate means to pay counsel. The Due Process Clause of the Fifth Amendment does not require that the "balance of forces" between the government and the accused be equalized with criminally tainted property.

ARGUMENT

THE SIXTH AMENDMENT QUALIFIED RIGHT TO COUNSEL OF CHOICE AND THE FIFTH AMENDMENT DUE PROCESS CLAUSE ARE NOT IMPLICATED BY THE LEGITIMATE INSTITUTION OF FORFEITURE PROCEEDINGS

The Court has the benefit of a great deal of both judicial and academic scholarship treating the consequence of forfeiture on the qualified right of counsel of choice. In addition to the decisions of the Fourth and Second Circuits

in the Caplin & Drysdale, Chartered and Monsanto cases, respectively, the Fifth, Seventh, Eighth and Tenth Circuits have rendered decisions touching on this issue. (United States v. Jones, supra, 837 F.2d 1332 [5th Cir.]; United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), modified 809 F.2d 249 (5th Cir. 1987); United States v. Moya-Gomez, supra, 860 F.2d 706 [7th Cir.]; United States v. Unit Number 7 and Unit Number 8, supra, 853 F.2d 1445 [8th Cir.]; United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988).) The academic literature is gathered and categorized in United States v. Nichols, supra, 841 F.2d at 1490-1491, n. 3.

Amicus curiae can add little to the chorus of thoughtful analysis offered by these courts and commentators. We submit brief in an effort to broaden the perspective in which the constitutional issues will be discussed. Secondly, we are

concerned that in the whirlwind of controversy which characterizes the constitutional question the deteminative issue may be obscured.

The Fourth Circuit reached, we submit, the correct conclusion when it held that "[f]orfeiture, in our view, is another of those events that may prevent a defendant from choosing his counsel but does not involve any denial of the qualified right to counsel of choice". (Caplin & Drysdale, Chartered, supra, 837 F.2d at p. 645.) However, it was the Tenth Circuit which best framed the issue when that court noted that the qualified right to counsel is implicated "only if the defendant has a constitutional right to use assets subject to forfeiture", in the first instance. (United States v. Nichols, supra, 841 F.2d at p. 1505.)

The line of this Court's jurisprudence beginning with Powell v. Alabama,

267 U.S. 45 (1932) and leaving off most recently with Wheat v. United States, ___ U.S. ___, 108 Sup.Ct. 1692, 100 L.Ed.2d 140 (1988) has established that the Sixth Amendment right to counsel begins and ends with a guarantee of an effective advocate. As regards the subordinate and qualified right to counsel of choice, this Court observed "A defendant may not insist on representation by an attorney he cannot afford . . .." (Id., ___ U.S. at p. ___, 108 Sup.Ct. at p. 1697, 100 L.Ed.2d at p. 149.)

That the qualified right to counsel of choice is limited by the legitimate means to employ counsel has been presupposed by a number of courts. (Wilson v. Mintzes, 761 F.2d 275, 280 (6th Cir. 1985) ["when an accused is financially able to retain an attorney, the choice of his counsel to assist rests ultimately in his hands."]; United States v. Lewis, 759

F.2d 1316, 1326 (8th Cir. 1985) ["The Constitution recognizes solvent defendants' interest in retained counsel."]; United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984) ["This Court has recognized that individuals who can afford to retain counsel have a qualified right tc obtain counsel of their choice."]; Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981) ["a defendant [may] select his own counsel at his own expense."]; United States v. Burton, 584 F.2d 485, 489 (D.C.Cir. 1978) ["An accused who is financially able to retain counsel must not be deprived of the opportunity to do so."]; United States v. Inman, 483 F.2d 738, 739-740 (4th Cir. 1973) [the courts have recognized the right of "any accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by the attorney of his choosing."]; People v. Holland, 23 Cal.3d

77, 86, 151 Cal.Rptr. 625, 630, 588 P.2d 765, 770 (1978) ["a defendant financially able to retain an attorney of his own choosing can be represented by that attorney . . . using any legitimate means within his resources . . .."]

Conceding that the right to counsel of choice is subject to the "harsh reality that the quality of a defendant's representation frequently may turn on his ability to retain the best counsel money can buy" (Morris v. Slappy, 461 U.S. 1, 23 (1983) (Brennan, J. concurring)) and that every defendant is guaranteed competent counsel by appointment if necessary (Gideon v. Wainwright, 372 U.S. 335 (1963)) the Sixth Amendment jurisprudence applicable in these cases ends. Contrary to the analysis of a number of the Circuit Courts, we do not believe any balancing or weighing of interests is therefore required. The defendant should not be heard to bargain

with property (criminally tainted) in which the state recognizes no private title. The only question which remains is whether the government may constitutionally restrain the use of property which is alleged to be subject to forfeiture regardless of the intended or desired use for that property. The answer must be unequivocally yes.

Whether justified as protecting the government's interest in property which ultimately will be forfeited to it and preventing the dissipation of that property during pendency of the forfeiture proceeding (see, Caplin & Drysdale, Chartered, supra, 837 F.2d at pp. 643-646) or on the basis of the "relation back" rule which vests title to an asset in the government at the time of the offense (see, United States v. Nichols, supra, 841 F.2d at pp. 1499-1501), the government clearly has the right to restrain and prevent the dissipation of property alleged to be

subject to forfeiture during the pendency of the forfeiture proceedings.

> "The government's interest in the tainted property arises from the government's power to regulate illegal activities. More specifically, the government has an interest in regulating the means and fruits of illegal activity. Laws defining contraband are one example of congressional power to create a governmental interest in property involved in criminal activity." (United States v. Nichols, supra, 841 F.2d at p. 1500.)

This Court has twice held that the governmental interest underlying the forfeiture statutes justifies the seizure and restraint of a person's property without a prior judicial determination that the seizure is justified, to say nothing of the ultimate question which is whether the property is forfeit to the government. (United States v. $8,850 in U.S. Currency, 461 U.S. 555, 562 (1983); Calero-Toledo v. Pearson Yacht Leasing Company, 416 U.S. 663, 680-681 (1974).)

"Pearson Yacht clearly indicates that due process does not require federal Customs officials to conduct a hearing before seizing items subject to forfeiture. . . . The government interests found decisive in Pearson Yacht are equally present in this situation: the seizure serves important government purposes; a preseizure notice might frustrate the statutory purpose; and the seizure was made by government officials rather than self-motivated private parties." (United States v. $8,850 in U.S. Currency, supra, 461 U.S. at 562, n. 12.)

Outside the forfeiture context, this Court has sanctioned other types of pretrial restraints which are found to serve the public interest. Accordingly, just as the government may restrain liberty to prevent the flight of a suspect (Bell v. Wolfish, 441 U.S. 520, 534 (1979)) or to protect the community from further criminal deprivations (United States v. Salerno, ___ U.S. ___, 107 Sup.Ct. 2095, 95 L.Ed.2d 697 (1987)), so, too, may the government seize and otherwise restrain assets which are subject to forfeiture to prevent the

dissipation of those assets or their further use for illicit purposes. Similarly, a court may inquire into the source of bail (see, United States v. Nebbia, 357 F.2d 303, 304 (2d Cir. 1966)), and assure itself that bail is not from an illegitimate source (see, United States v. DeMarchena, 330 F.Supp. 1223, 1226 (S.D.Cal. 1971)). Thus, illgotten gains will not be accepted in exchange for pretrial liberty.

Such pretrial deprivations of liberty or property must, however, be imposed in accordance with the requirements of due process. Although not raised in either of the two cases before the Court, amicus curiae believes that a defendant is entitled to a reasonably prompt post seizure or restraint hearing in which the government should be required to show probable cause to believe that the property is subject to forfeiture if the defendant

claims and establishes an important need for the property, i.e., to employ counsel. (United States v. Moya-Gomez, supra, 860 F.2d at 726-730; United States v. Unit Number 7 and Unit Number 8, supra, 853 F.2d at pp. 1449-145.)

The restraint of property which is subject to forfeiture serves "the public interest in preventing continued illcit use of the property and enforcing criminal sanctions" (Calero-Toledo v. Pearson Yacht Leasing Company, supra, 416 U.S. at p. 679). Manifestly, such restraint has only an incidental and nonarbitrary impact on the qualified right to counsel of choice not unlike the other vagaries of economic life. Therefore, there is no call to balance the government's interest in the restraint of assets against a defendant's right to choose counsel because that right is qualified in the first instance by the availability of legitimate resources to pay

counsel. Simply stated, the forfeiture of criminal related property does not invade the recognized right to counsel of choice.

Equally, the Fifth Amendment Due Process Clause is not implicated by the restraint and forfeiture of tainted property. The "balance of forces between the accused and his accuser" (Wardius v. Oregon, 412 U.S. 470, 474 (1973) is implicated only if this Court is prepared to recognize that a criminal defendant has a right to use his ill-gotten gains to defend himself, or if it can be shown that the prosecution improperly instituted forfeiture proceedings in a deliberate effort to strip a defendant of his legitimate resouces. In the first instance, it beggars reason to believe that this Court would recognize a constitutional right to use and enjoy the proceeds of criminal activity. Second, nothing in the cases before the Court

suggest any impropriety in the targeting of the property for forfeiture. Furthermore, the mere possibility of abuse is hardly sufficient to declare a statutory scheme unconstitutional as violative of the Due Process Clause. United States v. Nichols, supra, 841 F.2d at p. 1508.)

* * *

CONCLUSION

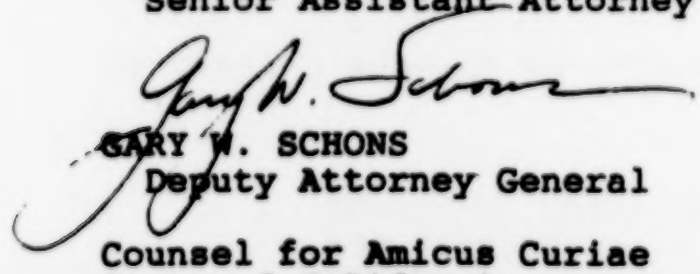
The restraint of property alleged to be subject to forfeiture does not implicate the qualified right to counsel of choice nor does it offend the Due Process Clause of the Fifth Amendment as respects the balance of powers between the government and the accused. Accordingly, the decision of the Second Circuit en banc in Monsanto should be reversed and the decision of the Fourth Circuit en banc in Caplin & Drysdale, Chartered should be affirmed.

DATED: February 1, 1989

JOHN K. VAN DE KAMP, Attorney General
of the State of California

STEVE WHITE, Chief Assistant
Attorney General

JOHN A. GORDNIER,
Senior Assistant Attorney General



GARY W. SCHONS
Deputy Attorney General

Counsel for Amicus Curiae
State of California

CERTIFICATE OF SERVICE BY MAIL

No. 88-454 & 87-1729

UNITED STATES OF AMERICA, PETITIONER,

v.

PETER MONSANTO

CAPLAIN & DRYSDALE, CHARTERED, PETITIONER

v.

UNITED STATES OF AMERICA

GARY W. SCHONS, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 110 West A Street, Suite 700, San Diego, California 92101; that on February 3, 1989, he caused to be served a true copy of the attached Brief of the State of California, as Amicus Curiae in the above-entitled matters, on counsel for petitioners and counsel for respondents by placing same in an envelope addressed as follows:

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Washington, D.C. 20530

(Counsel for the United States of America)

Said envelope was then sealed and deposited in the United States mail at San Diego, California, with the postage thereon fully prepaid.

GARY W. SCHONS
Deputy Attorney General
Special Prosecutions Unit

Subscribed and sworn to before me this 3rd day of February, 1989.

Notary Public in and for said County and State